OGC 76-1411

19 March 1976

MEMORANDUM FOR: Director

FROM : John S. Warner
General Counsel

SUBJECT : Legislation to Protect Intelligence Sources and Methods

1. On 19 February 1976 the President sent to the Congress proposed legislation to protect intelligence sources and methods, as he had announced he would at his news conference on the previous evening. Congressman McClory immediately introduced this bill as H.R. 12006. This legislation is the result of two years of intensive work by this Office and extensive negotiations with the Department of Justice. Substantial concessions were made by both sides, and on 31 December 1975 the Deputy Attorney General, in a letter to the Director of Central Intelligence, advised that the Agency's latest version of the proposed statute was basically satisfactory and, subject to minor changes which were later made, the Departm nt did not object to submission of the bill to the Congress.

2. Subsequent to the introduction of the bill by Congressman McClory, the Attorney General's office advised us that they had some reservations about some parts of the bill. We have held two meetings at the Department with members of the Attorney General's staff to discuss changes that they would make. We believe that most of these can be worked out to the satisfaction of both sides. However, we believe that the two principal changes proposed by the Department will result in unacceptable deficiencies in the bill.

3. The first change would limit coverage of the bill to members of the Executive Branch, independent agencies, the armed services and Government contractors. The second would delete the provision for an injunction against a person who is about to disclose classified intelligence sources and methods in violation of the criminal provisions of the bill.

4. The Department of Justice acknowledges that the purpose of limiting the coverage of the bill is to exclude members of Congress and their staffs from the possibility of prosecution for unauthorized disclosures. I believe

it would be a serious mistake to exempt members of Congress and their staffs from the coverage of this bill and, particularly, to limit the coverage to the Executive Branch, armed services and contractors. We have researched the United States Code and found no felony statute so limited in its application. The result would be to grant a unique statutory immunity to Congressmen and to exempt others such as judicial clerks and administrative staffs, contacts and consultants who are not under contract, and probably other classes of individuals who should be covered in H.R. 12006. As a practical matter, the Speech and Debate Clause of the Constitution provides immunity to Congressmen and their staff members acting in their official capacities and this immunity, of course, cannot be overcome by the statute.

5. According to members of his staff, the Attorney General's position is that, whereas members of Congress really should not be exempt, the Executive Branch should not be the one to propose their coverage, but rather they should impose it upon themselves by amending the bill during the legislative process. This is a political position which I do not believe should be a consideration for this Agency in attempting to propose the best possible legislation.

6. The proposal to delete the injunction provision was made by the Attorney General on 17 March, when he stopped in briefly at a meeting between members of his staff and representatives of this Agency. He said that he felt that we had satisfactory protection on a case-by-case basis without a statute, as a result of the decision of the Fourth Circuit in the Marchetti case, and that the injunction provision would be severely attacked in the legislative process, and had very little chance of passing anyway. We do not necessarily agree with his assessment of the chances of approval of the injunction provision.

7. The injunction provision may be invoked only when someone is about to take action which will constitute a violation of the criminal provision. In view of the fact that the criminal sanctions cover only those who have had a privity of relationship with the Government, the injunction provision does not cover the press. The press can be covered only on the basis of a pre-existing injunction against a person who has had a privity of relationship with the Government, such as a former employee, where, as in the Marchetti case, the press is acting as an agent for that employee. The Department's first proposal had been to modify this provision so that it could not be extended to a publisher or anyone else acting for the person who would disclose classified intelligence sources and methods. This would make a nullity of the provision.

8. I feel that we should continue to support the inclusion of a provision for a statutory injunction against persons who would make unauthorized

disclosures and against any person acting for them. This would not permit the Government to seek an injunction directly against a publisher as was attempted against The New York Times in the Ellsberg case, but would permit the court to extend its order to a publisher acting for a person who would make an unauthorized disclosure, provided the publisher had not already received the information.

9. While it is true that the Marchetti case is strong precedent in seeking similar injunctions in the future regardless of statutory authority, it is a case of first instance and is binding only upon other courts in the Fourth Circuit. It may be difficult precedent for a defendant to overcome, but it is less certain that courts in other circuits will follow the precedent than that they will grant injunctions under the terms of a specific statute which must be followed by all courts. Furthermore, the Supreme Court denied certiorari in the Marchetti case and it may be many years before the Supreme Court makes a decision in a similar case which would be binding upon all American courts. The question of the possibility of criticism and serious attack on this legislation as a result of the injunction provision is one that must be weighed, but upon which a decision can be made at any time in the legislative process. If the chances of success finally appear poor or if the criminal provisions of the bill are at great risk because of the injunction provision, it can be deleted and legislative history created to mitigate any effect of the deletion.

10. I strongly recommend that you oppose exemption of persons outside the Executive Branch from the coverage of the bill, and that you oppose deletion of the injunction provision. This position is called for both by the merits of the provisions the Attorney General would change, and the fact that the bill as it stands was worked out carefully with the Department of Justice over a period of two years, and was approved by the Deputy Attorney General speaking for the Department. My view is that we should press forward with the bill as sent up by the President and introduced in the House and let the Congress work its will.

STAT

JOHN S. WARNER

OGC: JDM: lsh
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1 - DDI 1 - OLC 1 - SC/DCI

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OGC 76-1423

18 March 1976

MEMORANDUM FOR THE RECORD

SUBJECT: Sources and Methods Legislation

I discussed sources and methods legislation and the attached memorandum of 18 March with the Director today. On the two basic issues Mr. Bush said we should adhere to our previously established position.

STAT

JOHN S. WARNER
General Counsel

Attachment

cc: DDO
DDI
Act. D/DCI/IC
OLC
SC/DCI

18 March 1976

MEMORANDUM FOR: Director of Central Intelligence

FROM: John S. Warner
General Counsel

SUBJECT: Sources and Methods Legislation

1. This memorandum is for information only. It concerns our efforts to secure criminal sanctions for unauthorized disclosure of sources and methods. In January of 1974 we submitted a formal proposal to OMB to accomplish this purpose. After two years of in-depth discussions with the Department of Justice, they on 31 December 1975 agreed with legislation which we had mutually worked out. This legislation was endorsed by the President in a White House statement of 18 February 1976. The proposed legislation accompanied the White House release. Subsequently the bill was introduced in the Congress.

2. As I reported earlier at a morning meeting at which you were not present, the Attorney General wishes to make significant changes in that legislation. The two principal issues are: (a) the Attorney General wishes to limit the criminal sanctions to employees of the Executive Branch. We have researched this issue and have not found that any other felony statute is so limited. All other felony statutes in effect say "whoever violates"; (b) our legislation provided statutory basis for injunction which was aimed at potential violators of the criminal provisions. In view of the fact that the criminal sanctions covered only those who had a privity of relationship with the Government, the injunction provision did not cover the press. The press could be covered only on the basis of a pre-existing injunction against a former employee, as in the Marchetti case where the press was acting as an agent for the employee.

3. The Attorney General and his representatives assert that the Agency's proposed legislation (which is the Department of Justice's view as of 31 December 1975 and is the outstanding President's view) will raise great problems in the Congress. My view is to press forward with the recorded Department of Justice view and the President's position and let the Congress work its will.

4. A more detailed memorandum will be forwarded on this matter which discusses our most recent negotiations with the Department of Justice yesterday. However, I thought it important that you be aware of the basic issues since action will undoubtedly go forward while you are away and an Agency position must be established.

STAT

John S. Warner

OGC 76-1422

18 March 1976

MEMORANDUM FOR THE RECORD

SUBJECT: Electronic Surveillance Legislation

REFERENCE: Memo to DCI fr Gen. Counsel dtd 18 Mar 76

I discussed this with the Director today as to what action, if any, was required. He indicated that following the meeting he was asked about the Agency position, and he pointed out that the Agency would stand by its view expressed in a memorandum to Attorney General Levi and Jack Marsh, Counselor to the President, of 10 March 1976.

STAT

JOHN S. WARNER
General Counsel

Attachment
Referent Memo

cc: DDO
DDI
Acting D/DCI/IC
OLC
SC/DCI

ogc 76-1370

18 March 1976

MEMORANDUM FOR: Director of Central Intelligence

FROM: John S. Warner
General Counsel

SUBJECT: Electronic Surveillance Legislation

1. Last week, I believe on the 12th, you attended a meeting at the White House to discuss the above subject, accompanied by [redacted] As I understand it the Secretary of State was there with his Legal Adviser. Also present were the Attorney General, the Secretary of Defense and Robert Ellsworth. Philip Buchen was also present. As I understand it no consensus was reached. STAT

2. I have been informed by representatives of the Department of Defense and representatives of the Department of State that subsequently Buchen prepared a memorandum to the President with respect to the legislation. Those representatives also have indicated that as a result a request has been made for final agency positions with respect to the proposed legislation. I am unaware that the Agency has been requested for its position, either orally or in writing. In any event I think we should present the Agency's position and I would like to discuss this with you so that we may reach a position.

[redacted] STAT

John S. Warner

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